United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 75-4223

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HENRY BOOK, et al., d/b/a
SPRAIN BROOK MANOR
Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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STATEMENT OF ISSUE PRESENTED

Whether the Board properly concluded that the Company violated Sections 8(a)(1), (2) and (3) of the Act by recognizing and executing a contract with Local 999, International Brotherhood of Teamsters when that union represented only a minority of the unit employees.

STATEMENT OF THE CASE

This case is before the Court upon application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 135, 73 Stat, 519, 29 U.S.C. § 151 *et seq.*), for enforcement of its order against Henry Book, *et al.*, a partnership doing business as Sprain Brook Manor ("the Manor"). The Board's Decision and Order, (A. 16)[1] issued on July 30, 1975 and is reported at 219 NLRB No. 148. The Board's decision was rendered by Chairman Murphy and Members Jenkins and Kennedy.[2] This Court has jurisdiction, the unfair labor practice having occurred in Scarsdale, New York.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(1) (2) and (3) of the Act by recognizing and entering into a collective bargaining agreement including a union security clause with Local 999, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers ("Local 999" or "the Union") when it had not been designated by a majority of the unit employees. The evidence underlying the Board's findings is detailed below.

A. Background

Respondents Book, Russ, and Klein comprise a partnership which owns and operates Sprain Brook Manor, a nursing home in Scarsdale, New

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[1] "A" references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] Members Fanning and Penello dissented from the Board's decision (A. 27).

York (A. 3; 33, 39). In February 1974[3] Sprain Brook had 101 full time employees in the following classifications: registered nurses ("RNs"), licensed practical nurses ("LPNs"), nurses' aides, physical therapy aides, recreational aides, maintenance men, and kitchen staff (A. 16; 46). The employees had never been represented by a union before February 20, 1974.

B. The Manor recognizes Local 999 after a card check

Local 999 has its headquarters in Patterson, New Jersey (A. 81). It represents six other nursing homes but none are in Westchester County or in any of the counties adjoining Westchester County (A. 82-83, 88). According to Local 999's business agent, DeFranco, he happened upon the Manor by accident in early February when he was "just riding around" Westchester County after visiting a factory in the Bronx (A. 81-82). After learning from an unidentified passerby that the Manor had no union, DeFranco decided to organize the employees (A. 83-85).

DeFranco and another Local 999 agent distributed authorization cards at the entrance to the Manor on three occasions in mid-February (A. 16; 86-88). According to DeFranco, he received 12 signed cards from a woman "in a blue uniform" during his second visit, 3 more cards during the third visit, and an additional 45 cards by mail (A. 86-88). In mid-February, Local 999 notified the Manor that it had obtained signed cards from a majority of the regular employees (A. 16; 44).

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[3] All dates are 1974.

The Manor and the Union agreed that Joseph Wildebush, an arbitrator, would check the cards.[4] On February 20, the Union submitted 59 cards, which Wildebush compared with the signatures on the employees' W-4 forms (A. 16-17; 44, 46, 62-63). He rejected two unsigned cards and three with printed signatures. The signatures on the remaining 54 cards he found similar to those on the W-4 forms "from his own observation and not as a handwriting expert." Wildebush concluded that the cards showed that "a majority of the employees desired representation" by Local 999. (A. 17; 44). That day, the Manor recognized Local 999 as the exclusive represntative of the 101 employees (A. 17; 46). Sometime thereafter, the Union destroyed the authorization cards.

On February 22, the Manor and Local 999 signed a three year collective bargaining agreement covering a unit of 77 employees, consisting of all nurses' aides, recreational aides, physical therapy aides, maintenance men, and kitchen staff, but excluding 24 RNs and LPNs (A. 17; 42, 46). The contract required union membership of all covered employees within thirty days of its signing or after their date of hire, whichever was later.

C. A majority of the employees deny signing authorization cards

On March 21, 27 days after the Manor and Local 999 executed their agreement, Local 1199, Drug and Hospital Union, Retail, Wholesale, and Department Store Union, AFL-CIO filed an unfair labor practice charge against the Manor.[5] The complaint issued on May 23, alleging that the

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[4] Wildebush belongs to the American Arbitration Association and the Federal Mediation and Conciliation Service (A. 44).

[5] Local 1199 had conducted some organizing activity at Sprain Brook Manor early in 1974 (A. 17; 102-104).

Manor violated Section 8(a)(1), (2), and (3) of the Act by recognizing Local 999 and signing a contract with a union security clause at a time when Local 999 had not been designated by a majority of the unit employees. At the hearing, the General Counsel presented 70 of the 101 persons employed by Sprain Brook Manor on February 20. Sixty-one of these witnesses were included in the 77 member unit covered by the February 22 contract. All 70 testified that they had never signed a card for Local 999 or in any other way authorized it to represent them.[6] The employee witnesses are grouped as follows:

The Recognition Unit

Classification	No. In Unit	No. of Nonsigners
Kitchen	14	8
Physical Therapy Aide	1	1
Maintenance	5	5
RN's	14	2
LPN's	10	7
Nurses' Aide	56	46
Recreational Aide	1	1
	101	70

The Contract Unit

Classification	No. In Unit	No. of Nonsigners
Kitchen	14	8
Physical Therapy Aide	1	1
Maintenance	5	5
Nurses' Aides	56	46
Recreational Aide	1	1
	77	61

[6] Only 25 of the 70 actually gave testimony subject to cross-examination. (A. 58, 60, 68, 71-79, 90-91, 97-100, 104-06). The parties stipulated that the testimony of the remaining 45 would be identical (A. 107-110). The Administrative Law Judge advised counsel that he would give the testimony of the 45 equal weight with that of the 25 actual witnesses (A. 107). Since both the Judge and the Board did so (A. 7, 17), the brief is written as if all testified.

II. THE BOARD'S CONCLUSION AND ORDER

Based on the above testimony, the Board found that the Manor had violated Sections 8(a)(1)(2) and (3) of the Act by recognizing Local 999 on February 20, and by signing a contract which included a union security clause on February 22, although the Union did not represent a majority of the employees in either the recognition or contract units on the critical dates.

The Board's order requires the Manor to cease and desist from recognizing or otherwise supporting Local 999 or any other labor organization which does not represent a majority of employees in an appropriate unit; from giving effect to the collective bargaining agreement of February 22; and from in any like or related manner interfering with its employees' Section 7 rights.

Affirmatively, the Board's order requires the Manor to reimburse all present and former employees for all initiation fees, dues, or other moneys paid or checked off since February 22 pursuant to the invalid union security agreement, and to post the appropriate notices. Finally, the Board ordered the Manor to withdraw and withhold recognition from Local 999 unless and until it is duly certified by the Board as the exclusive representative of the employees.

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY RECOGNIZED A MINORITY UNION, AND SIGNED A CONTRACT WITH A UNION SECURITY CLAUSE, IN VIOLATION OF SECTION 8(a)(1), (2) AND (3) OF THE ACT

A. Introduction

Sections 7 and 9 of the Act grant employees the fundamental right to free choice and majority rule in deciding who, if anyone, is to be their collective bargaining representative. To protect these rights, Section 8(a)(2) of the Act[7] embodies "a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence." *Intl. Assn. of Machinists, Lodge No. 35 v. N.L.R.B.*, 311 U.S. 72, 80 (1940). Employees' Section 7 rights to "bargain collectively through representatives of their own choosing" or "to refrain from such activity" are clearly abridged when an employer recognizes a union that a majority of them have not chosen for their collective bargaining representative. Accordingly, an employer renders unlawful support in violation of Section 8(a)(2) by recognizing a minority union. *Intl. Ladies Garment Workers Union v. N.L.R.B. (Bernhard-Altman Corp.)*, 366 U.S. 731, 738-39 (1961). The employer's good faith belief in the union's majority status is no defense, for even mistaken recognition of the minority union infringes the employees' freedom of choice. *Intl. Ladies Garment Workers Union v. N.L.R.B., supra*, at 739. And the injury to employee rights is

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[7] Section 8(a) provides in pertinent part:

"It shall be an unfair labor practice for an employer . . .
(2) to dominate or interfere with a labor organization or contribute financial or other support to it . . ." 29 USC § 158(a).

aggravated where, as in this case, the union and the employer sign a collective bargaining agreement with a union shop provision. See *N.L.R.B. v. Hunter Outdoor Products, Inc.*, 440 F.2d 876 (C.A. 1, 1971); *Intalco Aluminum Co. v. N.L.R.B.*, 417 F.2d 36 (C.A. 9, 1969).

B. The General Counsel's evidence constitutes a strong *prima facie* case that the Union was unlawfully recognized

As the Statement shows, the Manor recognized Local 999 on February 20 after a card check by arbitrator Wildebush based on a unit of 101 employees, and two days later signed an agreement covering a unit of 77 employees. The General Counsel presented the testimony of 70 employees in the recognition unit (61 of the 70 were in the contract unit) that they had never signed authorization cards or in any other way authorized Local 999 to represent them. The Administrative Law Judge found no basis for discrediting the testimony of any of these witnesses (A. 7; 107). All five Board members agree that this testimony constitutes a *prima facie* case that Local 999 lacked majority status at the recognition date (A. 17, 28).

This *prima facie* case is not weakened, as the Board noted (A. 20-21), by the fact that it was impossible to confront these witnesses with the 54 cards approved by arbitrator Wildebush, because the cards were subsequently destroyed by Local 999. Even if available, the cards obviously need not have been introduced or used by the General Counsel as part of his case. Rather, the cards were a resource for the Manor's defense, to be used in cross-examining the General Counsel's witnesses or in the Manor's part of the hearing.[8] Furthermore, any uncertainty about Local 999's right

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[8] The proponent of a writing is responsible for proving its genuineness. *See* McCormick, Evidence § 185 (1970 ed.); 9 Wigmore, Evidence §§ 2129, 2132 (1940 ed.).

(continued)

to represent these employees arising from the cards' unavailability should be resolved against the Manor we submit, since the Manor is asserting Local 999's right to represent the employees and the uncertainty is attributable to Local 999's Act.

Furthermore, Local 999's own evidence of its organizational activities at Sprain Brook creates further doubt that 54 employees could have signed its cards. Thus, as related, Local 999's business agent, DeFranco, did not attempt to organize the Manor in response to any overture by the employees; he stumbled on the Manor while "just riding around" in Westchester County. During the next few weeks, DeFranco and another agent of Local 999 drove out to the Manor on three occasions and distributed cards to employees as they were leaving the premises. This was the whole of the Union's campaign. Local 999 held no meetings with employees, distributed no literature, recruited no inside organizers – did nothing, in short, to persuade the Manor's employees that they needed the services of a union.[9]

Finally, there is DeFranco's testimony that only about 15 signed cards were turned over to him on his visits to the Manor, while the balance (some 45 cards) were received in the mail. As noted, Local 999 represented no other nursing home employees in Westchester County or the

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[8] (continued)
Since the Manor is asserting the existence and validity of the cards as its defense, it bears that burden. The General Counsel's *prima facie* case of no majority, on the other hand, does not depend in any way on the cards' existence or authenticity.

[9] If, despite this minimal "campaign", the employees nevertheless developed an interest in Local 999, there was no sign of that interest by the time of the hearing. The Manor offered no employee who was able to testify to any kind of organizing in Local 999's behalf – not even the woman "in a blue uniform" who, according to DeFranco, had collected 12 signed cards from other employees and turned them over to him (A. 87-88).

adjacent counties; it is unlikely that any employee had ever heard of it. Considering the circumstances of the Union's "campaign" – particularly its utter failure to communicate with the employees about who it was and what it could do for them – the odds seem long against 45 employees taking the trouble to sign and mail in Local 999's card. Compare *National Maritime Union v. N.L.R.B.*, 353 F.2d 521, 522 (C.A. 2, 1965).

C. The Board reasonably concluded that arbitrator Wildebush's card check did not overcome the General Counsel's *prima facie* case.

A number of considerations support the Board's refusal to give the card check decisive weight. The first is that the card check was conducted in a unit of 101 employees which included 24 RNs and LPNs, whereas the contract unit, which omitted the RNs and LPNs, contained only 77 employees. There is no way of knowing, of course, what names were on the 54 cards validated by the arbitrator. If only 14 of those names were the names of RNs or LPNs, however, there were only 38 cards from employees who ended up in the 77-employee contract unit – one short of a majority.[10] Thus, even assuming the Union's majority in the original unit, it was nevertheless a clear cut violation of Section 8(a)(2) if the Manor contracted with Local 999 for a redefined unit in which a majority of the

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10 The dissenting Board members take exception to this conclusion on the ground that 9 of the 24 employees in the RN/LPN group testified that they had not signed cards, and therefore, no more than 15 names from this group could have been included in the 54 cards validated by the arbitrator, so that these cards must have included at least 39 names from the 77 employees in the contract unit (A. 29). In reply the Board pointed out that this reasoning treats the testimony of the 15 RN/LPNs as *absolute* rather than *prima facie* proof as to whether they signed a card. To be consistent, as the Board pointed out, it would be necessary to "credit the other 59 [employees] who testified . . . that they did not sign a Teamsters authorization card" (A. 22 n. 11). If they are credited, however, the Teamsters could not have had a majority.

employees had not designated Local 999 as their bargaining agent. *ILGWU v. N.L.R.B. (Bernhard-Altman), supra.*[11]

Furthermore, as the Board observed (A. 20), there was no agreement by the affected employees – or by anyone empowered to act in their behalf – to be bound by the result of the card check. Thus, their situation is akin to that of an employer who is involved in a jurisdictional dispute but, unlike the competing unions, has not agreed to participate in their procedure for resolving such disputes. The Supreme Court ruled that such an employer must be considered one of the "parties to the [jurisdictional] dispute" within the meaning of Section 10(k) in light of the employer's "substantial economic interests" in the resolution of the matter. *N.L.R.B. v. Plasterer's Local Union 79*, 404 U.S. 116, 124. The Court went on to hold that such an employer must have voluntarily consented to the procedure if an award of work was to have an impact on the employer's rights. *Id.* at 131-132. As the Court observed, "although this Court has frequently approved an expansive role for private arbitration in the settlement of labor disputes, this enforcement of arbitration, agreements and settlements has been predicated on the view that the parties have voluntarily bound themselves to such a mechanism at the bargaining table." *Id.* at 133.

Clearly, the interest of employees in not having a minority union imposed upon them is just as precious under the scheme of the Act as the interests the Supreme Court dealt with in the *Plasterers* case. It follows that, where, as here, employees have not consented to an arbitration

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[11] This principle imposes no inordinate burden on a conscientious employer. Ordinarily, parties end up by contracting for a unit which is essentially the one involved in the card check. If, however, the parties contemplate contracting for a unit which differs substantially from the original unit, the employer need only ask that the check be repeated for the benefit of employees in the redefined unit.

procedure, an award which affects this vital interest cannot automatically be given controlling force.[12]

In addition, an arbitrator's card check report is inherently not entitled to the same degree of respect which the Board gives a grievance arbitration award. Where a grievance arbitration award resolves a question common to both the grievance and the Board's case, the Board will ordinarily defer to the award "unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness or serious procedural irregularity or that the award was clearly repugnant to the purposes of the Act." *International Harvester Co.*, 138 NLRB 923, 927 (1962), enf'd *sub nom. Ramsey v. N.L.R.B.*, 327 F.2d 784 (C.A. 7, 1964), cert. denied, 377 U.S. 1003. See also *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). It is fundamental to this deferral policy, however, that the arbitration procedure was agreed to by the duly designated agent of the affected

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[12] The Board's approach here – that is, its willingness to consider employee testimony impugning the validity of the card check – is clearly not inconsistent with cases like *N.L.R.B. v. C & C Packing Co.*, 405 F.2d 935 (C.A. 9, 1969) and *Snow v. N.L.R.B.*, 308 F.2d 687 (C.A. 9, 1962). These cases teach that an employer may not belatedly demand an election after the card check to which he has agreed indicates the union's majority. The factor of *employer consent* is a crucial distinction in those cases. Here, the Board said, "We are unable to see how the [card check], to which the competing union and the individual employees were not parties, can bar our consideration of [employee testimony], even though the [Company] might be estopped from raising the issue" (A. 21-22).

In a closely related area involving a possible conflict between employee free choice and informal recognition, the Board does not automatically defer to outside fact finding. When a union is recognized by the employer, in good faith on the basis of a demonstrated card majority, and at a time when no other union is attempting to organize the employees, representation elections are barred for a reasonable time thereafter. See *Display Sign Service*, 180 NLRB 49 (1969); *Sound Contractors Association*, 162 NLRB 364 (1966). However, the Board will independently examine the record to determine whether a second union was involved, regardless of agreements on third party card checks. *Superior Furniture Mfg. Co.*, 167 NLRB 309 (1967); *Rheingold Breweries, Inc.*, 162 NLRB 384 (1966).

employees. Here, however, Local 999 suggested a card check, not as an agent of the unit employees, but to establish its right to represent them.

But even if the *Spielberg* policy is fully applicable to arbitrator Wildebush's report, the Board has repeatedly declined to defer to arbitration where the record fails to show that either the employer or the union were aligned in interest with the affected employees, and that one or the other actually represented this common interest at the arbitration proceeding. See *T.I.M.E.-D.C., Inc. v. N.L.R.B.*, 504 F.2d 294, 302-303 (C.A. 5, 1974; *Kansas Meat Packers*, 198 NLRB No. 2 (1972), 80 LRRM 1743. In the card check context, however, the employees' vital interest in a free choice of bargaining agent will not necessarily be shared by either their employer or the union seeking recognition. Rather, as Congress recognized when it enacted Section 8(a)(2), this procedure carries an obvious potential for abuse and imposition at the expense of unrepresented employees; this chance would be increased if the Board were disposed to give controlling weight to an arbitrator's card check regardless of the surrounding circumstances.[13]

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[13] While the Board may, in its discretion, defer to the fact-findings of private persons, it retains, of course, the overriding statutory authority to adjudicate unfair labor practice charges itself. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964). Accord, *N.L.R.B. v. Horn & Hardart, Inc.*, 439 F.2d 674 (C.A. 2, 1971). The role of the reviewing court is to see that the Board's discretion is not abused. See *Ramsey v. N.L.R.B.*, 327 F.2d 784, 787-788 (C.A. 7, 1964), cert. den., 377 U.S. 1003. As this Court has stated:

> [I]t is worth remembering that the Board's rules on deference, after all, are self imposed . . . . We do not suggest that the Board can announce a policy regarding deference to arbitration and then blithely ignore it, thereby leading astray litigants who depend on it. But it can change its mind or alter its standards for deference in some respects without necessarily engaging in conduct so blameworthy as to justify calling it an abuse of discretion.

N.L.R.B. v. Horn & Hardart, Inc., supra, at 679.

It is true, as the Administrative Law Judge observed (A. 8-9) that the Manor, having agreed to a card check, was exposed to a charge of violating Section 8(a)(5) if it refused to recognize Local 999 in the face of the arbitrator's report. Nevertheless, the Board's position is not, on balance, unfair to an employer which, like the Manor, is willing to expedite the process of collective bargaining by having a card check. Such employer can obtain a large measure of protection by insisting that the arbitrator, after checking the cards, must retain them in his custody until the six month period of limitation has passed. Such employer may also insist, as a condition to such recognition, that the union agree to indemnify it against liability for dues and fees, in the event its recognition of the union is found unlawful.

Even if, as here, an employer is found to have recognized a minority union, the Board's typical remedial order bears rather lightly insofar as it cancels the employer's contract with the minority union and forbids recognition of that union in the future absent its certification by the Board. Arguably, the employer is better off operating under these restraints than with a work force which is angry about the imposition of a bargaining agent by error or fraud. The Board's order bears more heavily in that it also requires the employer to reimburse its employees for dues and fees paid over to the minority union. However, the employer's liability can be kept within reasonable limits if, as soon as an 8(a)(2) charge is filed, it arranges for dues and fees to be paid into an escrow account until the matter is resolved. Cf. *N.L.R.B. v. Penn Cork & Closures, Inc.*, 376 F.2d 52, 54 (C.A. 2, 1967), cert. denied, 389 U.S. 843.

In sum, the Board's refusal to give the arbitrator's card count decisive weight is not inconsistent with prior law; it provides maximum protection to the crucial employee right of free choice; and it creates no undue hardship for an employer. While the aribrator's report supplies

some evidence of Local 999's designation by unit employees, the Board was clearly not unreasonable in concluding that the testimony of 70 employees as to whether they signed a Teamsters authorization card is "the best objective evidence available as to the authenticity of the cards" (A. 21). It follows clearly enough from that evidence that, as the Board found, the Manor "violated Section 8(a)(1) and (2) of the Act by recognizing Teamsters Local 999 and Section 8(a)(3) by executing a collective-bargaining agreement containing a union-security provision with such Union at a time when it did not represent a majority of the employees in an appropriate unit" (A. 22-23).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should enter a judgment enforcing the Board's order in full.

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December, 1975.

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Elliott Moore
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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 30th day of December, 1975.